

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONNA DAVIS, <sup>1</sup>	§
	§ No. 420, 2010
Respondent Below-	§
Appellant,	§
	§ Court Below—Family Court
v.	§ of the State of Delaware
	§ in and for New Castle County
DIVISION OF FAMILY	§ File Nos. 08-12-04TN
SERVICES,	§ 10-02-02TN
	§ CN06-05934
Petitioner Below-	§ Petition Nos. 08-38733
Appellee.	§ 10-05030
	§ 07-27613
	§ 10-15244

Submitted: November 17, 2010

Decided: January 10, 2011

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices

**ORDER**

This 10<sup>th</sup> day of January 2011, upon consideration of the appellant’s brief filed pursuant to Supreme Court Rule 26.1, her attorney’s motion to withdraw, the response of the appellee, the Division of Family Services (“DFS”), and the response of the attorneys *ad litem*, it appears to the Court that:

(1) The respondent-appellant, Donna Davis (“Mother”), has filed an appeal from the Family Court’s June 10, 2010 order terminating her

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<sup>1</sup> The Court *sua sponte* assigned pseudonyms to the parties by Order dated July 14, 2010. Supr. Ct. R. 7(d). In this Order, we also assign pseudonyms to the parties’ children.

parental rights (“TPR”) in her six minor children. On appeal, Mother’s counsel has filed an opening brief and a motion to withdraw pursuant to Supreme Court Rule 26.1. Mother’s counsel submits that he is unable to present a meritorious argument in support of the appeal. Despite being afforded an opportunity to do so, Mother has submitted no points for this Court’s consideration. DFS and the attorneys *ad litem* have moved to affirm the Family Court’s judgment. For the reasons that follow, we conclude that the judgment of the Family Court must be affirmed.

(2) DFS, a division of the Delaware Department of Services for Children, Youth and Their Families, brought two actions, which were consolidated for purposes of trial, to terminate the parental rights of Mother in her six minor children---five girls, Evie, Karen, Joan, Gail, and Debi (the “Girls”), and one boy, Steven (collectively, the “Children”). At the time of the TPR hearing, the Children ranged in age from 4 to 14. The hearing took place in the Family Court on April 29, 2010, April 30, 2010 and May 10, 2010. DFS sought to terminate Mother’s parental rights on the ground of failure to plan adequately for the Children’s physical needs or mental and

emotional health and development pursuant to Del. Code Ann. tit. 13, §1103(a)(5).<sup>2</sup>

(3) The procedural background of this matter is as follows. The Girls first entered DFS custody pursuant to an *ex parte* emergency order issued by the Family Court on August 30, 2007, after a police search of Mother's home resulted in her arrest on drug and child endangerment charges. At a preliminary protective hearing in September 2007, the Family Court found probable cause that the Girls were in actual physical, mental or emotional danger. At an adjudicatory hearing in October 2007, the Girls were found to be dependent. Mother was incarcerated at the time and Father, who failed to appear at the hearing, was facing weapon and drug charges in New York.

(4) At a dispositional hearing in December 2007, the Family Court issued an order incorporating by reference Mother's, Father's and DFS's respective case plans regarding the Girls, with the goal of reunification. At a review hearing in June 2008, the Family Court found that Mother had been released from prison and was visiting with the Girls. A permanency hearing was held in September 2008. At that time, although Mother had missed

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<sup>2</sup> DFS also sought to terminate the parental rights of Ronald Davis ("Father"). Father offered no defense and did not appear for any portion of the trial. The Family Court also terminated Father's parental rights. Father did not participate in this appeal.

several appointments with Brandywine Counseling for substance abuse treatment, she had obtained appropriate housing and was employed part-time. Because Father had left the State, reasonable efforts for reunification with him could not be continued. Supervised visitation by Mother with the Girls was continued by the Family Court.

(5) A second permanency hearing regarding the Girls was held in April 2009. At the hearing, the Family Court learned that Mother had again been incarcerated, this time for a violation of probation. Father also was incarcerated in Delaware on drug and weapon charges, as well as a charge of endangering the welfare of a child. The Family Court changed the goal with respect to Mother to termination of parental rights for purposes of adoption, concurrent with the goal of reunification.

(6) At a review hearing in October 2009, the Family Court found that the Children continued to be dependent and that neither Mother nor Father had made significant progress towards the goal of reunification. Mother had been released from prison, but did not have appropriate housing. The Family Court denied Mother's motion for additional visitation with the Children, since she had missed one of three scheduled visits with Steven following her release from prison. On December 7, 2009, the Family Court judge interviewed Evie and Karen *in camera* in preparation for the TPR

hearing the next day. On December 8, 2009, the day of the TPR hearing, Mother executed a consent to the termination of her parental rights with regard to the Girls, which she later revoked.<sup>3</sup> The TPR hearing was continued so that counsel could be appointed for Father.

(7) In March 2009, the Family Court issued an emergency *ex parte* order granting temporary custody/guardianship of Steven to DFS after Father was arrested.<sup>4</sup> At a preliminary protective hearing in April 2009, the Family Court found probable cause to believe that Steven was dependent, since both Mother and Father were incarcerated. At an adjudicatory hearing in May 2009, the Family Court found Steven to be dependent. In August 2009, the Family Court issued an order authorizing DFS to obtain medical treatment for Steven in connection with his severe ADHD, because neither Mother nor Father would consent to treatment. At a preliminary hearing in February 2010, the Family Court issued an order changing the goal for Steven to termination of Mother's parental rights for purposes of adoption, concurrent with continuation of the goal of reunification. The matter was consolidated with the TPR hearing regarding the Girls.

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<sup>3</sup> Del. Code Ann. tit. 13, § 1106B(a).

<sup>4</sup> An older brother also entered DFS custody at that time. However, by the time of the Family Court hearing, he was no longer a minor.

(8) On the day before the TPR hearing, the attorneys *ad litem* moved the Family Court for the appointment of an attorney to represent the interests of Evie, the oldest of the Children, on the ground that Evie was opposed to the termination of her Mother's parental rights and the adoption of her and her siblings.<sup>5</sup> The Family Court denied the application for the appointment of counsel on the ground that, contrary to the situation presented in *In re Frazer*, 721 A.2d 920, 923 (Del. 1998), Evie's interests in the proceedings had been sufficiently represented by counsel appointed for Mother and Father. In addition, Evie had spoken *in camera* with the Family Court judge in preparation for the TPR hearing in December 2009 and fully stated her position at that time. In denying the application, the Family Court also stated that the hearing already had been delayed once so that Father could have counsel appointed and that any further delay would unnecessarily prolong the Children's uncertainty and stress.

(9) Following the consolidated TPR hearing on April 29, 2010, April 30, 2010, and May 10, 2010, the Family Court made the following findings of fact based upon the testimony and documentation presented at the hearing. Mother, who was 40 years old, had borne eight children. Two of the children had reached the age of majority. With the exception of

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<sup>5</sup> The attorneys *ad litem* did not oppose the termination of Mother's parental rights.

Mother's oldest daughter, Alice, Father had fathered all of the children. Mother had used drugs for approximately 16 years beginning in her early 20's. Mother was incarcerated several times since August 2007, even though her case plans required her not to incur additional criminal charges. Although Mother completed a substance abuse evaluation as required by her case plans, she never completed the required treatment program with Brandywine Counseling and was discharged from the program several times due to non-compliance. Mother testified that she was attending group sessions on Saturdays. She denied choosing those sessions because no drug screening is done on Saturdays.

(10) Mother's case plans required her to obtain appropriate housing to accommodate the Children, but she had not done so. She claimed to be residing alone in a one-bedroom apartment for which she had a year's lease, but, despite repeated requests from DFS, failed to produce a copy of the lease. She denied that the apartment's size would be an obstacle to reunification because the family had lived in a motel room and a shelter in the past. Mother's case plans also required her to obtain employment to support the Children. Mother claimed to have a part-time job at a photo and video shop, but, despite requests from DFS, failed to provide any pay stubs to verify the claim. Mother denied that her supervisor is also her boyfriend.

However, the supervisor attended a visitation session with her and Mother admitted telling Father that she and her supervisor were having sexual relations. Mother completed a Strengthening Families class at Children and Families First regarding Steven, but did not complete the class with respect to Joan, as required by her December 2008 case plan.

(11) Mother has not participated in the Children's medical care since DFS became involved with them. With only one exception, Mother did not know the names of the Children's schools or daycare. She stated that she relies solely on what the Children tell her to monitor their educational progress. Mother was aware that Steven is lagging developmentally, but admitted not knowing the particulars of his diagnosis or whether he receives special educational services. She could not explain why she did not attend an IEP meeting at Steven's school in September 2009 and did not recall receiving an educational assessment done by Steven's school, which had been sent to her by DFS. Mother has never communicated with DFS or Steven's foster mother regarding his educational needs or progress.

(12) Mother had a mental health evaluation as required by her November 2007 case plan. She admitted to having mental health issues and has been diagnosed with cocaine abuse, alcohol abuse and depression. She was prescribed medication for depression in December 2009, but stopped



taking the medication when her symptoms lessened. Mother agreed that her substance abuse issues and repeated incarcerations have hampered her ability to be a successful parent. Mother admitted that New York Child Services was involved with her family prior to May 2006, when she moved to Delaware. The records from New York reflect an extensive criminal history, including charges of prostitution, drug offenses, and thefts. In Delaware, Mother has been arrested and incarcerated on drug charges as well as charges of driving without a license, truancy in connection with Steven's failure to attend school, disorderly conduct, and loitering to solicit sex.

(13) Mother testified that she wants to be reunited with the Children. She stated that she can feed them, clothe them, and make sure they attend school. She claimed to have a strong support system and that all the Children, with one exception, want to be reunited with her. She stated that she is in good physical health, has not used alcohol since 2007, and has not used illegal drugs since 2008.

(14) A number of professionals testified at the hearing, as well as the Children's respective foster mothers. Their testimony may be summarized as follows. Lauren Abbott, a DFS treatment worker, testified that initially she attempted to place the Children with relatives, but was unable to do so.

While Mother told Brandywine Counseling in the fall of 2009 that she had completed the Crest Program while in prison, Abbott discovered that, in fact, Mother had been discharged from Crest after testing positive for drugs. While Abbott kept Mother informed of the Children's counseling and medical appointments and encouraged her to attend those appointments, Mother did not do so. On both occasions when Debi had ear and tear duct surgery, Mother was incarcerated. Abbott enrolled the Children in their schools and informed Mother of where they were enrolled. Despite Abbott's encouragement, Mother did not become involved in the Children's schooling.

(15) Susan Anderson, an assessor with Brandywine Counseling, testified that, while Mother has made brief commitments to treatment, she has not been able to maintain that commitment. During one assessment in December 2008, Mother admitted that she was addicted to cocaine and that drugs were readily accessible to her because Father was a dealer. Pursuant to the policy of Brandywine Counseling, patients must have two drug screens per month during the first three months and then one monthly screen thereafter. Over a period of about four years, Mother had only twelve screens, two of which were positive. According to Anderson, Mother has

avoided having the required number of screens, indicating her continued use of illegal drugs.

(16) Alicia Russell, a counselor with Brandywine Counseling, also testified. Russell treated Mother during the period November 2009 through January 2010. During that time, Mother had five individual sessions, one of which she missed, and sixteen group sessions. She was discharged in February 2010 due to her failure to return a phone call from Russell. Russell testified that, after that, Mother attended group sessions, but only on Saturday when drug screens are not conducted.

(17) Lisa Toy, an advanced practice nurse with Connections, testified concerning her psychiatric evaluation of Mother in November 2009. At that time, Mother reported a history of mental illness and stated that she currently was experiencing mood disturbances, audio hallucinations, and racing thoughts. Toy recommended two medications designed to stabilize Mother's condition. However, Mother did not return to Connections again until April 2010, a couple of days before the TPR hearing.

(18) Moira Dillon, a DFS permanency adoption worker, testified concerning the current status of the Children in foster care. Dillon began working with the Girls in May 2009 and with Steven in March 2010. Dillon observed that the Children have become confused because Mother and

Father told them they would be reunited after the case was over. Dillon reported that the two older girls, Evie, age 14, and Karen, age 12, have struggled in foster care. The girls' foster mother reported that they often do not follow the house rules and sometimes lie and steal. The foster mother provides a structured environment for Karen to do her homework, but Karen receives poor grades and has been forced to quit the track team as a result. In spite of the girls' struggles, it is Dillon's opinion that termination of Mother's parental rights is the appropriate option. Michelle Ropeter, a counselor from Middletown Counseling, has worked with Evie and Karen and agrees with that assessment.

(19) The next two girls, Joan, age 10, and Gail, age 5, live together in another foster home. Joan has said that she would like to live with Mother, but also has identified a family from church with whom she would like to live. Gail has had behavioral problems in daycare, but is now in counseling and has begun medication for ADHD. Even though their foster mother is not able to adopt the girls, Dillon stated that DFS will be able to find adoptive parents for them. Dillon observed that both girls have thrived in foster care. They know the routine for dinner and bedtime and their foster parents are involved in their schooling and activities.

(20) The littlest girl, Debi, is 4 years old. She has been in foster care since infancy and is comfortable in her foster home. While the foster mother has not made a decision about adoption, Dillon nevertheless believes that termination of Mother's parental rights is the appropriate option. Dillon testified that Steven also is comfortable in his foster home. His foster mother has addressed his ADHD issues and has provided structure for him, resulting in improvement in his condition. Dillon testified that adoption is the best option for Steven. According to Dillon, visitation with Mother and Father has been chaotic and confusing for the Children. Father has failed to keep two appointments and Mother has gone to the Children's schools in violation of the Family Court's order that visitation be supervised. Dillon, finally, testified that all of the Children's foster families are willing to keep them if they cannot be adopted.

(21) All of the Children's foster mothers testified at the hearing. Donna Anderson, foster mother for Evie and Karen, stated that the two girls are very close. They are physically healthy, up-to-date with medical and dental appointments, and in counseling for behavioral issues. Evie's behavior has improved markedly and she now gets good grades. Karen's behavior initially was good, but has deteriorated. According to Ms. Anderson, Karen's behavior declined after visitation with Father. Both girls

received cell phones so they could keep in touch with their parents, but Karen's privileges were taken away when she communicated the address of her foster family to Mother. In Ms. Anderson's opinion, even though the girls are opposed to being adopted, they need structure and stability in their lives.

(22) Joan and Gail's foster mother, Shirley Clark, testified that Joan does well in school, participates in the drama club, and has lots of friends. She is quiet and respectful. Gail has had behavioral issues at daycare and has recently been diagnosed with ADHD. Both girls are up-to-date with their medical and dental appointments and are attending counseling. They have visitation with Mother and Father. Joan has told Ms. Clark that she would cry if she could not live with her parents, but that she would adjust. She is open to being adopted. Gail is too young to have an opinion about adoption, but Ms. Clark stated she does not believe Gail wants to live with Mother and Father. Ms. Clark believes that adoption is the best option for Joan and Gail, although she herself is not an adoptive resource.

(23) Debi's foster mother, Jennifer Jenkowski, testified that Debi has become outgoing since she first entered foster care. She has a sibling relationship with Ms. Jenkowski's 10 year-old son, whom Debi refers to as her big brother. Debi is up-to-date on her medical and dental care. She has

had surgeries for ear tubes and to unclog her tear ducts. She has asthma and uses a nebulizer. When Debi first came to live with Ms. Jenkowski, she needed six months of speech therapy. Debi also has a condition called “pica,” which involves attempting to consume non-edible substances such as paper or hair. The condition is associated with emotional trauma. Debi also has had issues with bad dreams, which tend to occur after visitation with her parents. Ms. Jenkowski noted that Debi’s parents arranged for her second birthday party at a local party center and then failed to show up. Debi wants to remain with her foster family, but Ms. Jenkowski has not yet decided if she will be able to adopt Debi.

(24) Elena Coates, Steven’s foster mother, testified that Steven is one of six foster children she has in her home. When Steven came to live with her, he was twenty pounds underweight and needed glasses. Neither Mother nor Father has ever attended a medical appointment with Steven. They refused to consent to medication when he was diagnosed with ADHD and a court order was required. Steven’s attention span and behavioral problems have improved since he began his medication. Since entering foster care, Steven also has been tested and his educational needs are being addressed. Steven has had visitation with his parents, but his behavior has

deteriorated after each visit. Ms. Coates stated that she is attached to Steven, but she is not able to adopt him.

(25) Mother's oldest daughter, Alice, testified on Mother's behalf. Alice lives in Washington State and is in the army. She has worked at Fort Lewis Army Base for two years and plans to be there another eight years. Alice is willing to be the guardian or an adoptive resource for all six of the Children. Alice appears to have a close relationship with Evie and Karen through Facebook and texting. Alice wants to be part of her siblings' lives. She stated that, when Mother was on drugs, she would get the younger children ready for school and take them to medical appointments. She herself was in foster care for two years in New York when she was seven years old. From age twelve to age fifteen, she and a brother lived with an aunt. From age seventeen to nineteen, she lived with a paternal half-sister. Mother was addicted to cocaine during this period. Alice stated that she believes Mother is not currently addicted to drugs. Alice provides Mother with financial support. She insisted that she will not be deployed overseas.

(26) Ruth Wilson, the Children's maternal grandmother, also testified on behalf of Mother. Wilson lives in Brooklyn, New York, and comes to Delaware every couple of months. She had not seen the Children for about two years since DFS's involvement. Wilson stated that she



recently spoke to the older children and that they want to be reunited with Mother. Wilson does not want Mother's parental rights to be terminated. She stated that she initially did not realize the extent of Mother's addiction. She now believes Mother is clean. Wilson wants to be considered an adoptive resource for the Children, but only has a one-bedroom apartment.

(27) In its June 10, 2010 order terminating Mother's parental rights, the Family Court concluded that DFS had proven by clear and convincing evidence that it had developed meaningful case plans for Mother and had made reasonable efforts to reunify Mother with the Children. The Family Court also concluded that DFS had proven by clear and convincing evidence that Mother had failed to plan adequately for the Children's physical needs or mental and emotional health and development and, furthermore, that the Children had been in the care of DFS for over one year and that there was a history of neglect and lack of care on the part of Mother.<sup>6</sup> The Family Court observed that, despite having over two years in which to address the issues identified in her case plans, Mother had been unable to complete critical elements. As the Family Court stated, "The most significant obstacle to Mother's ability to plan for the Children has been her addiction to drugs. While Mother expressed a commitment to staying clean, she has failed to

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<sup>6</sup> Del. Code Ann. tit. 13, §1103(a)(5).

successfully address her substance abuse issue.” Finally, the Family Court concluded that DFS had proven by clear and convincing evidence that termination of Mother’s parental rights was in the best interests of the Children.<sup>7</sup> As the Family Court stated, “. . . all of the Children need structure and consistency in their lives. . . .”

(28) This Court’s review of the Family Court’s decision to terminate parental rights entails consideration of the facts and the law as well as the inferences and deductions made by the Family Court.<sup>8</sup> To the extent that the Family Court’s rulings of law are implicated, our review is *de novo*.<sup>9</sup> The Delaware statute governing the termination of parental rights requires a two-step analysis.<sup>10</sup> First, there must be proof of a statutory basis for termination.<sup>11</sup> Second, there must be a determination that termination of parental rights is in the best interests of the child.<sup>12</sup> Both requirements must be established by clear and convincing evidence.<sup>13</sup>

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<sup>7</sup> Del. Code Ann. tit. 13, §722(a).

<sup>8</sup> *Wilson v. DFS*, 988 A.2d 435, 439-40 (Del. 2010) (citing *Solis v. Tea*, 468 A.2d 1276, 1279 (Del. 1983)).

<sup>9</sup> *Id.* At 440.

<sup>10</sup> Del. Code Ann. tit. 13, §1103 (listing grounds for termination of parental rights); *Shepherd v. Clemens*, 752 A.2d 533, 536-37 (Del. 2000).

<sup>11</sup> *Id.*

<sup>12</sup> *Shepherd v. Clemens*, 752 A.2d at 537; Del. Code Ann. tit. 13, §722(a) (listing best interests factors).

<sup>13</sup> *Powell v. DSCYF*, 963 A.2d 724, 731 (Del. 2008).

(29) We have carefully reviewed the parties' submissions as well as the record below. We conclude that there is ample record evidence supporting the Family Court's termination of Mother's parental rights, both on the statutory ground of Mother's failure to plan and on the ground that such termination is clearly in the best interests of the Children. There was no error or abuse of discretion on the part of the Family Court.

NOW, THEREFORE, IT IS ORDERED that the motions to affirm are GRANTED. The judgment of the Family Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice